Petition

81-1254

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No. _____

Supreme Court of the United States

October Term—1981

ATHENA PRODUCTS, LTD.,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. Questions Presented

The United States Postal Service brought this action against Petitioner corporation, pursuant to 39 U.S.C. §3005 and §3007, alleging that Petitioner had solicited monies through the mails by means of false representations in its advertising of fifteen designated products. Section 3005 prohibits solicitation of monies through the mails by means of false representations and authorizes detention of all mail sent to a person who violates this statute. Section 3007 authorizes a federal district court, upon a probable cause showing that §3005 is being violated, to issue a preliminary injunction detaining all of the alleged offender's mail pending conclusion of §3005 administrative proceedings. The questions thereby arising are:

(1) Whether 39 U.S.C. §3007 violates the First Amendment mandate that restraints of speech must be narrowly drawn and not in excess of that necessary for the Government to achieve its objective because:
   (a) it authorizes detention and examination of all of a defendant's mail, pending conclusion of administrative proceedings;
   (b) detention and examination of all mail occurs even if the challenged representations are removed from the advertising;
   (c) no time limits are provided for termination of detention of mail and completion of the administrative proceedings;
   (d) detention and examination of mail may be imposed upon a showing of probable cause and without any showing of intent to deceive;
   (e) said restraints pose a serious threat of ruining a defendent's business prior to any adjudication on the merits;
   (f) Congress had available to it the less restricive alternative of simply prohibiting a defendant from making the representations alleged to be false.

(2) Whether said First Amendment mandate was likewise violated by the preliminary injunction issued against the Petitioner for a period of one hundred twenty days, subject to extension, which fully implemented the §3007 restraints described above.

(3) Whether said First Amendment mandate is violated by 39 U.S.C. §3005, which imposes identical restraints to §3007, except that (a) restraints are imposed after an administrative hearing on the merits; and (b) the restraints are permanently imposed.

(4) Whether §3007 fails to provide adequate procedural safeguards as the restraints, described above, can be imposed for an indefinite period upon only a showing of probable cause.

(5) Whether injunctions imposed pursuant to 39 U.S.C. §3005 and §3007 violate the principle that restraints of speech must significantly advance the Government's objective in that said injunctions fail to prohibit the continuation of advertising alleged to be false, though the purpose of the injunctions is to protect the public from false representations.

(6) Whether the Court of Appeals erred in holding that the First Amendment does not bar the Government from imposing excessive prior or subsequent restraints on commercial speech until such time as a defendant proves that its speech is truthful.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

ATHENA PRODUCTS, LTD., Petitioner

v.

UNITED STATES POSTAL SERVICE

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Athena Products, Ltd., prays that a writ of certiorari issue to review the opinion and judgment of the Fifth Circuit Court of Appeals rendered in these proceedings on August 27, 1981.

III. Opinions Involved

The opinion of the Court of Appeals, which is reported at 654 F.2d 362, appears in Appendix A, *infra,* p. A-1. The opinion of the District Court is unreported and appears at Appendix B, *infra,* p. B-1. The Court of Appeals affirmed the judgment of the District Court. A petition for rehearing to the Court of Appeals was denied without opinion. A copy of the notice of denial appears in Appendix C, *infra,* p. C-1.

IV. Jurisdiction

The judgment of the Court of Appeals was rendered on August 27, 1981. On September 9, 1981, the time for filing the petition for rehearing was extended through September 14, 1981. On this latter date a petition for rehearing was filed. On October 8, 1981, said petition was denied. This petition for certiorari was filed less than ninety days from the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

V. Constitutional Provisions and Statutes Involved

A. The Constitution of the United States, Amendment One, "Congress shall make no law. . .abridging the freedom of speech. . ."

B. The Constitution of the United States, Amendment Four, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

C. The Constitution of the United States, Amendment Five, "No person shall. . .be deprived of life, liberty or property, without due process of law. . ."

D. 39 U.S.C. §3005,
See Appendix D.

E. 39 U.S.C. §3007,

(a) In preparation for or during the pendency of proceedings under sections 3005 and 3006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postal Service and upon a showing of probable cause to believe either section is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

(b) This section does not aply to mail addressed to publishers of newspapers and other periodical publications entitled to a periodical publication rate or to mail address to the agents of those publishers."

VI. Statement of Facts

Petitioner, Athena Products, Ltd. (hereinafter "Athena") sells nutritional supplements and other related products through the mail. It also publishes *Soma*, a bi-monthly magazine which provides information on health and nutrition. The magazine has approximately 50,000 paid subscribers. Athena sells its products almost exclusively through advertisements in *Soma* magazine. Athena has been in business since 1977, and at the time of this action employed forty people.

The evidence is undisputed that the United States Postal Service (hereinafter "USPS") has examined each issue of *Soma* since 1977. The contents of the advertisements in *Soma* which are involved in this suit have been observed by the USPS for years

without comment or criticism. It is also undisputed that Athena had previously requested the USPS to notify it of any disatisfaction with any advertising so that the harsh consequences of §3005 and §3007 would not occur. The USPS will not provide any advisory opinions prior to publication as to whether or not an advertisement violates 39 U.S.C. §3005.

On February 27, 1981, the USPS filed fifteen administrative complaints against Athena pursuant to 39 U.S.C. §3005. At the same time it filed a complaint in District Court pursuant to 39 U.S.C. §3007, seeking a temporary restraining order and preliminary injunction (pending the completion of the §3005 administrative proceeding) to detain Athena's mail. Section 3005 prohibits the solicitation of monies or remittances through the mail by means of false representations and authorizes detention of all mail sent to a person who violates the statute, subject to the latter's right to survey the mail before the postmaster returns the mail to the sender. Section 3007 authorizes a federal district court, upon a showing of probable cause that §3005 is being violated, to issue a temporary restraining order and preliminary injunction detaining all mail of the alleged offender pending conclusion of the §3005 administrative proceeding. The Court *may* allow the alleged offender to remove mail unrelated to the allegedly unlawful activity.

Athena was given one and one-half hours notice of a temporary restraining order hearing on Friday, February 27, 1981, at 3:00 P.M. The case was then set down for a preliminary injunction hearing on March 12, 1981, thirteen days after the date of the filing of the complaint, which thirteen-day period included only eight weekdays. Athena moved for a continuance in order to have additional time to prepare in light of the fact that the evidence showed the USPS had been preparing its case for at least ten months without notice to Athena of the pendency of the proceeding and in light of the fact that the suit involved fifteen products and hundreds of pages of pleadings. The continuance was not granted.

At the request of the USPS, the Court ordered that Athena submit affidavits of any expert witness which it might use in the case within nine days of February 27, 1981, and five affidavits of this nature were filed within the specified time period. The affidavits were from three medical doctors, one doctor of

osteopathy, one Ph.D. in biochemistry, and one writer in the field of health and nutrition. The affidavits attested to the truth of Athena's advertising claims.

In addition to the expert testimony substantiating its claims, Athena presented hundreds of letters received from customers attesting to satisfaction with the fifteen products that were the subject matter of the complaint. The evidence further showed that products sold by Athena are commonly found in drug and health food stores and are available over-the-counter without prescription. The Court concluded that there was no real question by the USPS as to the safety of Athena's products. Athena provides all customers with an unconditional money-back refund at any time that it is requested.

The USPS's evidence was based solely upon the testimony of three alleged expert witnesses. There was no evidence presented by the USPS of any customer dissatisfaction with either Athena's products or service.

On April 2, 1981, the District Court issued a preliminary injunction directing the USPS to detain all of Athena's mail at certain specified addresses, including its street address, pending conclusion of the administrative proceeding but not in excess of one hundred twenty days, subject to Athena's right to examine and remove mail not related to the fifteen products which comprised the subject matter of the complaint. The order further directed that all future advertising for the fifteen products must solicit orders to the addresses where the mail was being detained by the USPS, so that all future orders from *any* advertising for the fifteen products would be detained. The injunction, in effect, restrained Athena from all advertising of the fifteen products even if it removed the challenged representations from its advertising. The District Court order also prevented Athena from receiving orders for any other products sold by Athena if such an order contained a request for one of the fifteen products. The preliminary injunction had the following effects upon Athena:

(1) Athena was put out of business for one hundred twenty days as the products involved in this lawsuit constitute ninety percent of the company's sales.

(2) Athena was prohibited from advertising in an undisputedly truthful manner for one hundred twenty days

as all advertising had to solicit remittances for the fifteen products to addresses where the mail would be detained and unanswered.

(3) Athena had no opportunity to communicate with those customers whose mail was detained.

(4) Athena was prevented from receiving any reorders for products, even though they resulted from (a) a satisfied customer who wished to continue receiving the product, or (b) a customer who placed an order as a result of a non-offending advertisement.

(5) Athena was prevented from receiving orders for products not related to the lawsuit if the commonly used order blank contained an order for one of the fifteen products.

(6) All mail addressed to Athena was subject to examination by USPS employees.

(7) An affirmative obligation was placed upon Athena to convince USPS employees that Athena was entitled to mail not related to the fifteen products.

Petitioner appealed the ruling and on April 10, 1981, an expedited appeal was granted. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1292(1).

Petitioner's chief argument on appeal was that §3005, §3007, and the preliminary injunction violated the First Amendment mandate that restraints of speech must be narrowly drawn and not in excess of that necessary to achieve the Government's objective. The Court of Appeals summarily disposed of this issue by stating,

> "In *Central Hudson Gas*, the court stated that whether a governmental regulation is more extensive than necessary only becomes relevant once it has been determined that speech is not misleading." See p. 368.

Second, Athena argued that the statutes and the injunction violated the First Amendment mandate that restraints of speech must significantly advance the Government's purpose. The Court of Appeals did not address this issue.

Third, Athena challenged the constitutionality of the District Court order which, in effect, prohibited Athena from advertising in a manner that was undisputedly truthful. The Court of

Appeals recognized the effect of the District Court order by stating,

> "While no direct prohibition on speech is involved, Athena is obviously deterred from advertising products for which it cannot fill orders." See p.g 365.

The Court of Appeals did not address this issue further.

Fourth, Athena argued that §3007 did not provide adequate procedural safeguards. The Court of Appeals rejected this contention on two grounds. First, the Court found that the one hundred twenty day limitation assured Athena of a "speedy" resolution on the merits. In fact, however, the injunction was continued by the District Court when a decision had not been received in one hundred twenty days. Second, the Court found that,

> "Despite the fact that the court assessed the evidence against a standard of probable cause, the hearing afforded in this case minimized the risk of an erroneous deprivation***." p. 368.
>
> It should be further noted that in Footnote 7 of the Court of Appeals' decision, the Court stated,
>
> > "Precisely what constitutes a showing of probable cause under §3007 is unclear." p.368.

A motion for rehearing was filed by Athena, as well as a motion for rehearing en banc. Both motions were denied.

VII. Reasons Why Certiorari Should Be Granted

A. 39 U.S.C. §3005, §3007, and the Preliminary Injunction Impose Draconian Restraints Which Violate First and Fifth Amendment Rights.

Certiorari should be granted to consider the constitutionality of the 39 U.S.C. §3005, §3007, and the preliminary injunction issued in the case at bar, as these statutes and the injunction impose Draconian restraints which infringe upon First and Fourth Amendment rights, as well as unnecessarily threaten the ruin of a business. This occurs regardless of the alleged offender's good faith or lack of intent to deceive, and despite the vagueness of the legal concept of "deception." Under §3007, these sanctions are imposed merely upon a showing of probable cause, which, according to the decision

of the Court of Appeals, is an unclear standard.

1. IMPACT OF AND CONSTITUTIONALITY OF §3007 AND THE PRELIMINARY INJUNCTION.

a. *Restraints of speech must be narrowly drawn.*

This Court has repeatedly held that restraints of speech must be narrowly drawn, not in excess of that necessary for the Government to achieve its objective, and cannot be sustained if the Government objective can be achieved by less restrictive means. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Carroll v. Pres. and Comm'r of Princess Ann*, 393 U.S. 175 (1968). This fundamental principle has been applied to commercial speech, *Central Hudson Gas and Electric Corp.*,, 447 U.S. 557, 565 (1980); *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 541(1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977); though the speech was without First Amendment protection by reason that it promoted an illegal activity, *Pittsburgh Press Co. v. Pittsburgh Human Relations Comm.*, 413 U.S. 376, 390 (1973), or constituted false and misleading advertising, *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 442 F.2d 611 (3d Cir. 1976); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977); *Encyclopedia Brittanica v. FTC*, 605 F.2d 964 (7th Cir. 1979). See also *Donaldson v. Read*, 333 U.S. 178, 183 (1948); *E.F. Drew v. FTC*, 235 F.2d 735, 747 (2d Cir. 1956).

In *Bates, supra*, this Court held that the state involved could have achieved its objective of protecting the public from any potential deception, which might result from advertising by attorneys, by means less drastic than barring all advertising. In *Pittsburgh Press, supra*, this Court sustained an order of a municipal agency prohibiting a newspaper from publishing job advertisements in sex-designated columns. Though *Pittsburgh* was decided before this Court expressly extended First Amendment protec-

tion to commercial speech, and the speech restrained promoted an illegal activity, i.e., sex discrimination in employment; nevertheless, in sustaining the order this Court noted, "The order is clear and sweeps no more broadly than necessary." 413 U.S. at 390.

Petitioner submits that §3007 and the preliminary injunction, which fully implements the statute, sweep "more broadly than necessary" and thereby unnecessarily invade First and Fourth Amendment rights and threaten the ruin of a business.

First, §3007 authorizes detention of all of a defendent's mail. Thus, communications clearly protected by the First Amendment, e.g., letters from a defendant's attorney, as well as those connected with the allegedly false speech, are examined and detained. Though a defendant *"may"* be authorized to inspect and remove mail unrelated to the allegedly illegal activity, this imposes an onerous burden since a §3007 order may last over a year, and the needs of a business may require checking the mail on a daily basis or more often. The burden becomes even more onerous if a dispute arises as to whether a communication is connected to the allegedly false speech, and a defendant must then "demonstrate its nonconnection" to the satisfaction of the local postmaster. *United States v. Book Bin,* 306 F.Supp. 1023 (N.D. Ga. 1969), aff'd *Blount v. Rizzi,* 400 U.S. 410 (1971). Further, a defendant is not necessarily allowed the right to examine its mail, as the statute does not require the District Court to allow such examination.

Second, §3007 permits or, as in the case at bar, has been interpreted to permit, the holding of all mail related to the product, which is the subject of allegedly false advertising, pending completion of administrative proceedings. Thus, even if a defendant eliminates allegedly false representations from its advertising, mail related to that product will nevertheless be detained. A defendant is not going to advertise a product if it cannot receive orders for it. Hence, a §3007 order suppresses totally truthful advertising,

as well as allegedly false advertising.

Third, a §3007 order remains in force pending conclusion of §3005 proceedings. However, no time limits are provided within which such proceedings must be completed. See, e.g., *United States v. Book Bin, supra.* In fact, the evidence in the within case showed that administrative proceedings have lasted more than eighteen months. Thus, a §3007 order may be imposed for an inordinate length of time.

Fourth, the line between truthful and false speech is not always clear. Whether or not advertising is deceptive is an issue upon which courts, regulatory agencies and businesses frequently disagree. See, e.g., *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965); *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977); *Standard Oil Corp. of Cal. v. FTC*, 577 F.2d 653 (9th Cir. 1978). Originally §3005 and §3007 applied only to actual fraud, *Reilly v. Pinkus*, 338 U.S. 269 (1949), which helps explain the harshness of the scheme. Now the Government does not have to prove an intent to deceive to obtain a §3007 order. *Lynch v. Blount*, 330 F.Supp. 689 (S.D. N.Y. 1971), aff'd 404 U.S. 1007 (1972). Thus, an order may issue though the representation challenged was made in good faith. Moreover, since a §3007 order detains and interferes with all of a defendent's mail, §3007 poses a substantial and recognized threat of ruining a defendant's business, *Reilly v. Pinkus, supra,* particularly if that business is small and dependent on mail orders. Thus, an order may issue under §3007 which results in the ruin of a business although the representations were the result of mistake, ignorance, or simply because a business took a position as to the falsity of a representation contrary to that of the employees of a government agency.

Fifth, a businessman may not risk publishing an advertisement which he believes to be truthful for fear that the Government has taken or will take a

contrary position, particularly if it involves a controversial issue. Thus, a business is not only deprived of advertising, which may be profitable to it and the public, but the Government may decide, even by innuendo, what a businessman may or may not say even if the Government's position is wrong.

Sixth, if a defendant is put out of business, he will have little interest in advertising as to a particular subject even if he still retains the financial ability to do so.

Seventh, since a §3007 order issues upon a mere probable cause showing, a business may be ruined even if the defendant subsequently succeeds on the merits.

Eighth, mail sent by consumers is detained for a year or more, along with the money paid for the product, without any explanation to the consumer. The defendant has no way of notifying such consumer, who may feel that his funds have been misappropriated.

Ninth, the action of the USPS creates a violation of 16 C.F.R. §4351, which requires notice of any shipping date delay after thirty days.

The excessiveness of §3007 is emphasized by the fact that Congress had available to it the less restrictive alternative of simply prohibiting a defendant from making the representations alleged to be false. For example, like §3005, the Federal Trade Commission Act, 15 U.S.C. §41, *et seq.*, is designed to protect the public from false and misleading representations. Under the Act the court may issue a preliminary injunction pending conclusion of administrative proceedings, 15 U.S.C. §53(a), (b). However, the court is limited to enjoining only the particular advertisement or representation alleged to be false.

(b) *Restraints on speech must advance the Government's purpose.*

Petitioner further submits that §3007 and the preliminary injunction are also unconstitutional for

failure to substantially further the Government's objective. This Court holds that,

> "[W]hen the government intrudes on one of the liberties protected by the Due Process Clause of the Fourteenth Amendment 'this Court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged regulation.' " *Schad v. Mt. Ephraim*, _____U.S._____, 101 S.Ct. 2176, 2184 (1981); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

In *Bellotti, supra,* this Court struck down a statute restraining commercial speech on the grounds that the statute was both underinclusive and overinclusive. Petitioner submits that the statute and the preliminary injunction are similarly defective.

On the one hand they unnecessarily suppress wholly truthful speech, permit interference with all of a defendant's mail, permit preliminary and final detention of mail unrelated to the allegedly unlawful activity, and threaten the ruin of a business. On the other hand they do not prevent a defendant from continuing to make representations alleged to be or found to be false. Thus, if a defendant retains the ability to change his operation or has little investment in it to begin with, i.e., a fly-by-night operation, such defendant could continue making the representations and distribute them through the mails. In fact, the public would be better served by the less drastic alternative of preventing a defendant from making the representations alleged to be false.

(c) *Lack of procedural safeguards.*

Petitioner submits that §3007 is unconstitutional for failure to contain adequate procedural safeguards. In determining whether procedural safeguards attendant to a preliminary deprivation suffice under the Due Process Clause, this Court has considered the private interests affected, the risk of erroneous deprivation, the probable value of the substituted safeguards, and the Government's in-

terests, including increased administrative burdens if a substituted procedure was utilized. *Matthews v. Eldridge,* 424 U.S. 319 (1975). In addition, this Court has considered relevant the length of time of the deprivation, *Matthews, supra; Fusari v. Steinberg,* 419 U.S. 379 (1975); the presence or absence of subsequent legal remedies, *Memphis Light, Gas and Water Div. v. Croft,* 436 U.S. 1 (1978); whether the "temporary" deprivation is, in fact, "uniquely final," *Memphis Light, supra;* whether a party can receive recompense in the case of wrongful deprivation, *Matthews, supra,* and whether the issues involve complex questions of evidence or evidence which can be simply documented, *Matthews, supra; Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974).

In the case at bar, not only are First Amendment interests affected, but Fourth Amendment interests as well. This Court has held since *Ex Parte Jackson,* 96 U.S. 727 (1877), that examination of the mail by the Government is subject to the warrant requirement of the Fourth Amendment, *United States v. Van Leeuwen,* 397 U.S. 249 (1970). Enforcement of §3007 orders inherently involves examination of the contents of mail of the alleged offender in order to separate mail subject to detention from that which may be received. Also affected is the right to carry on a business and solicit customers. This property interest has long been recognized as protected by the Due Process Clause, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928); *Deberry v. City of LaGrange,* 62 Ga.App. 74, 8 S.E.2d 146 (1940).

The restraint imposed under §3007 may last a year or more. The Postal Service is not required to post bond, and it is unlikely a defendant could maintain suit in case of wrongful deprivation. Thus, not only is a defendant's loss uniquely final as to First and Fourth Amendment rights, but also as to the loss of profits and customers as well. Finally, the issues in-

volved in §3007 proceedings rarely involve evidence which can be simply documented.

At the one end of the Due Process Clause are the minimal due process requirements applied in cases of temporary deprivation of property rights—notice, hearing and showing of probable cause, *Mitchell, supra,* at 609. This is the standard which Congress has adopted in §3007 proceedings. At the other end of the spectrum is the traditional doctrine of prior restraint as set forth in *Freedman v. Maryland,* 380 U.S. 51 (1965). This Court has stated on several occasions, without deciding, that the traditional doctrine of prior restraints may be inapplicable to commercial speech, *Central Hudson Gas, supra,* p.571, n.13. Petitioner submits that whatever this Court decides on this issue, the safeguards provided by §3007 are insufficient in view of the factors stated above.

The Court of Appeals, nevertheless, sustained §3007 on the basis that the order in the case at bar assured a speedy resolution on the merits of the case. Petitioner disagrees with this conclusion. Secondly, the Court of Appeals found, "despite the fact the court assessed the evidence against a standard of probable cause, the hearing afforded in this case minimized the risk of an erroneous deprivation***."

The Court of Appeals, however, ignored what this Court said in *Fuentes v. Shevin,* 407 U.S. 67, 87 (1972),

> " 'To one who protests against a taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have lead to the same result because he had no adequate defense upon the merits.' "

The Petitioner further notes that in *Blount v. Rizzi, supra,* this Court held 39 U.S.C. §3007, as applied in conjunction with §3006 proceedings (formerly §4007 and §4006), unconstitutional for failure to contain those procedural safeguards, ap-

plicable to prior restraints of obscenity, as set forth in *Freedman v. Maryland, supra.* Section 3006 is identical to §3005 except the former applies to obscenity and the latter to false representations. Since *Blount,* lower court decisions have sustained §3005 and §3007, in conjunction with §3005 proceedings, on the basis that the *Freedman* safeguards are inapplicable to false advertising. *Lynch v. Blount, supra; United States v. Outpost Dev. Corp.,* 369 F.Supp. 399 (C.D. Cal. 1973). It is noted that the Fifth Circuit, in the case at bar, purports to join this line of cases despite the fact that Petitioner did not argue that the *Freedman* safeguards applied to commercial advertising.

Furthermore, the issue decided in *Lynch* has been resurrected by subsequent decisions of this Court. Thus, as previously noted, in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), and *Central Hudson Gas and Electric Corp. v. Public Service Comm'n, supra,* this Court held that the traditional doctrine of prior restraints *may* be inapplicable to commercial speech.

2. THE CONSTITUTIONALITY OF §3005.

For the same reasons set forth as to §3007, Petitioner submits that §3005 is likewise unconstitutional for reasons of excessiveness and failure to significantly advance the Government's interests. There are only two differences between a §3005 and §3007 order. First, the former issues upon a probable cause showing; whereas, the latter issues after administrative hearings on the merits. Second, a §3007 order lasts until completion of §3005 proceedings. A §3005 order is permanent. Hence, a defendant is forever restrained from receiving orders for a product which has been the subject of false advertising, and is permanently subject to interference with its mail for as long as it uses the addresses designated in a §3005 order.

In addition it should be noted that a §3005 order issues without notice of any statutory right of appeal. The

result is that all mail which may have been previously held under §3007 is returned to sender before the affected company is afforded the opportunity to take any action for injunctive relief in the District Court.

Petitioner further notes that in *Donaldson v. Read,* 333 U.S. 178 (1948), this Court sustained the constitutionality of 39 U.S.C. §3005; however, it does not appear that the issues now raised by Petitioner were addressed in that case. Furthermore, the basis for that decision was the privilege doctrine, i.e., "the use of the mail is a privilege which 'Congress * * * may annex such conditions * * * as it chooses.' *Public Clearing House v. Coyne,* 194 U.S. 497 (1904)." *Hiett v. United States,* 415 F.2d 664, 666 (5th Cir. 1969). As the Court in *Hiett* recognized, this Court has since "given the privilege doctrine the burial it merits." *Id.* at 668. Thus, in *Blount v. Rizzi, supra,* this Court said,

> " 'The United States may give up the post office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues * * *.' "

In addition, *Donaldson* was decided before this Court's decision, in *Virginia, supra,* extending First Amendment protection to commercial speech, and the order sustained in *Donaldson* was directed to a scheme or device, i.e., a puzzle contest, rather than a commercial message. Despite these factors, the §3005 order in *Donaldson* narrowly escaped unconstitutionality only because it was voluntarily revised and narrowed by the Postal Service to detain only that mail specifically related to the contest found to be fraudulent. Not only is such narrowness not present in the case at bar, but the Court of Appeals has deemed it unnecessary.

B. The Court of Appeals Ruling Contravenes Four Constitutional Principles Established by this Court and is in Conflict With the Decisions of Other Federal Circuit Courts of Appeals.

Second, certiorari should be granted for reason that the Court of Appeals' decision contravenes four principles

established by this Court and directly conflicts with the decisions of other federal appellate courts.

The Court of Appeals has held, in effect, that until such time as commercial speech is proven to be truthful, the First Amendment does not bar the Government from imposing excessive restraints, including prior restraints, on commercial speech though the restraints unnecessarily restrain clearly protected, as well as arguably protected or unprotected speech, and threaten to ruin a business.

The effect of this rule is threefold. First, it deems commercial speech to be unprotected until proven otherwise. This contravenes the well established principle that speech is presumably protected until proven to be unprotected. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *Pittsburgh Press, supra; Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82, 88 (3rd Cir. 1969). Second, it puts the burden of proof upon the alleged offender to prove that its speech is truthful and therefore protected in order to escape the excessive restraints. This violates the principle that the Due Process Clause requires the Government to assume the burden of proving that speech is without First Amendment protection. *Speiser v. Randall*, 357 U.S. 513 (1958).

Furthermore, a defendant may be unable or unwilling to sustain the burden of proving its speech truthful for two reasons. First, as pointed out in *Speiser, supra*, at 525, "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." Second, what the law deems deceptive is no longer that which is false in fact. Indeed, the label of deception has been applied for the purpose of curing a variety of ills or imagined ills, e.g., *Bates, supra.*

In addition, a representation may be found to be false though it is neither false in fact nor misleading to the average consumer. Instead, deception includes that which is deemed to have the potential to deceive the ignorant, credulous, or unthinking. *Standard Oil Co., supra.*

In *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944), for example, the Commission found that respondent's representation that its products colored hair permanently was false and misleading for the reason that while it imparted "permanent colora-

tion to the hair to which it is applied,. . . it has 'no effect upon new hair' growth." In sustaining the Commission the Court said,

> "It seems scarcely possible that any user of the preparation could be so credulous as to suppose that hair not yet grown out would be colored by an application of the preparation to the head. But the commission has construed the advertisement as so representing it, and so construed it is false. * * * Since the Act is for the protection of the trusting as well as the suspicious, as stated in *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141, we think the order must be sustained on this point. The restraint which the prohibition in question puts upon the petitioners can be of little practical importance; it does not preclude them from advertising that Clairol colors permanently the hair to which it is applied."

See also *FTC v. Mary Carter Paint Co., supra.*

Thus, to show that speech is non-deceptive, an alleged offender would have to show that it has no potential to deceive even the most gullible person. This burden would cause a defendant to have to undertake costly consumer surveys which may be prohibitive. In fact, the Government customarily in proving such cases does not even attempt such an evidentiary burden but instead relies on "expertise." *Standard Oil Co., supra,* at 659.

Moreover, when faced with this expertise, an alleged offender may find its burden impossible to sustain. *Gelb, supra; Mary Carter Paint Co., supra.*

Furthermore, while on the one hand the Court of Appeals puts the burden on defendant to show its speech truthful, on the other hand, as in the case at bar, an alleged offender may be given little if any opportunity to prove its case. Under the statutory scheme of §3005, *et seq.*, the Federal District Court does not have jurisdiction to make a determination on the merits of the case. Its power is limited to a determination of whether probable cause exists to believe that a defendant is engaged in false advertising. This probable cause hearing is inadequate for a defendant to sustain the burden of proof placed upon it by the Court of Appeals. First, little time is

generally provided in preparation for preliminary hearings. In the case at bar, the Petitioner had eight working days to prepare its defense of claims pertaining to fifteen products, including procurement of expert witnesses and documentary evidence. Second, since the Government need only show probable cause, even if a defendant presents a strong case, if the evidence is highly conflicting the judge may be inclined to rule in the Government's favor on the basis of its "expertise" or role as protector of the public.

Requiring a defendant to assume the burden of proving its speech to be truthful in order to exercise clearly protected, as well as arguably protected, speech, in addition contravenes those decisions condemning the imposition of affirmative burdens as a condition to the exercise of speech. In *Lamont v. Postmaster Gen'l*, 381 U.S. 301 (1965), this Court struck down a statute prohibiting the delivery of mail deemed "communist political propaganda" unless the addressee of the mail requested delivery. Similarly, in *Thomas v. Collins*, 323 U.S. 516 (1945), this Court held unconstitutional a statute which required labor organizers to register prior to solicitation of persons for union membership. Clearly the burden of proving speech to be truthful far exceeds the burdens condemned in these two cases.

The third effect of the Court's ruling is that if a defendant fails to prove its speech truthful, excessive restraints may be imposed. This is contrary to the principle that restraints of speech must be narrowly tailored to serve a legitimate governmental interest, not in excess of that necessary for the Government to achieve its objective, and cannot be sustained if the Government's objective can be achieved by less restrictive means. *Shelton v. Tucker, supra; Carroll, supra; Central Hudson Gas, supra; Consolidated Edison, supra; Bellotti, supra; Bates, supra; Pittsburgh Press Co., supra.* This is also squarely contrary to those federal Court of Appeals decisions which applied this doctrine to commercial speech found to be unprotected by the First Amendment by reason that it constituted false or misleading advertising. *Warner Lambert Co., supra; Beneficial Corp., supra; Nat'l Comm'n on Egg Nutrition, supra; Encyclopedia Brittanica,*

supra. See also, *Donaldson v. Read, supra; E.F. Drew v. FTC, supra.*

Finally, it is observed that although the threshold requirement for presuming speech illegal under the Fifth Circuit's decision is probable cause, in view of the deference given to the acts of a legislature, it could as easily be found in a legislative determination that speech of a particular content is inherently deceptive, e.g., *Bates, supra.*

C. The Court of Appeals Misinterpreted *Central Hudson Gas, supra.*

Third, Petitioner submits that certiorari should be granted for the reason that the Fifth Circuit has misinterpreted *Central Hudson Gas, supra.* In reaching its decision, the Court of Appeals apparently relied on the following language in *Central Hudson Gas, supra,*

> "The First Amendment's concern for commercial speech is based on the informational function of advertising [cits. omitted]. Consequently, there can be no objection to suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communications more likely to deceive the public than inform it, *Friedman v. Rogers,* 440 U.S. 1, 59 L.Ed.2d 100, 99 S.Ct. 887 (1979); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. at 464, 465, 56 L.Ed.2d 444, 98 S.Ct. 912, or commercial speech related to illegal activity, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388, 37 L.Ed.2d 669, 93 S.Ct. 2553 (1973).
>
> If the communication is neither misleading nor related to the unlawful activity the government's power is more subscribed." 447 U.S. at p.563-564.

This language clearly does not address the issue as to what limitation must, or need not, be observed in prio. restraints of allegedly false commercial speech or speech subsequently found to be false. It simply reiterates what was said in *Virginia, supra,* at p.771,

> "Obviously much commercial speech is not provably

> false or even wholly false but only deceptive or misleading. We perceive no obstacle to a state's dealing effectively with this problem. The First Amendment as we construe it today, does not prohibit the state from ensuring that the stream of commercial speech flows cleanly as well as freely."

Whether false commercial speech may be prohibited or commercial speech regulated to protect the public from deception or potential deception is not the issue at bar. What is the issue is whether commercial speech may be subject to prior or subsequent restraints which are unnecessary to and do not significantly advance either of these objectives. Furthermore, unlike the restraints sustained in *Friedman v. Rogers*, 440 U.S. 1 (1979), and *Ohralik v. State Bar Ass'n*, 436 U.S. 447 (1978), or the "fencing in provisions" found in FTC cease-and-desist orders, see *TWA, Inc. v. FTC*, 594 F.2d 212 (9th Cir. 1979), the restraints here are not prophylactic measures designed to protect the public from future potential deception. In fact, the restaints do not even prevent an offender or an alleged offender from continuing to make the representations found to be or alleged to be false. Thus, the restraints are not designed to ensure "that the stream of commercial information flows cleanly."

D. Petitioner's Constitutional Challenge Raises Specific Issues in the Realm of Commercial Speech which this Court has not Resolved.

Finally, and to a limited extent, alternatively, certiorari should be granted for the reason that the constitutional challenge to these statutes and the injunction raises specific issues in the realm of commercial speech which this Court has not specifically considered. First and foremost is the issue raised but not decided by this Court of whether the traditional doctrine of prior restraints is applicable to commercial speech. See, e.g., *Virginia, supra*, at p.722, n.24; *Central Hudson Gas, supra*, at p.571, n.13. If traditional prior restraints are not applicable, what procedural safeguards must be present? This case squarely presents this issue.

In addition, this Court has observed that the application

of First Amendment law to commercial speech is an uncharted area. *Friedman v. Rogers, supra,* p.11, n.9. This Court has never considered the application of the First Amendment to commercial speech alleged to be or found to be false but not connected with special interest economic regulation. This case presents important issues in this precise area.

Finally, this Court's decision in *Friedman, supra,* presents an ambiguity which should be clarified. *Friedman* suggests that the doctrine of the less restrictive alternative and the requirement that a restraint must significantly advance the Government's interest may be inapplicable to commercial speech. *Id.*, p.12, n.11; p.15, n.14. On the other hand, *Friedman* is contrary, on these two issues, to prior and subsequent decisions by this Court. *Bates, supra,* p.374; *Central Hudson Gas, supra,* p.564. Moreover, *Friedman* emphasized that the issues involved trademarks which have no intrinsic meaning and special interest economic regulations.

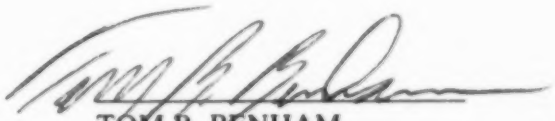
Finally, this Court emphasized,

> "Texas has done no more than require that commercial information * * * 'in such form...as [is] necessary to prevent its being deceptive." 440 U.S. at p.16.

On the other hand, *Friedman* is the only case in which the Court found that the speech subject to restraint was deceptive. This may or may not have implications for the case at bar. This is an issue which this Court ought to clarify.

VIII. Conclusion

In conclusion, for these reasons a writ of certiorari should issue to review the judgment and opinion in the Fifth Circuit Court of Appeals.



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Appendix

APPENDIX A

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,
v.
ATHENA PRODUCTS, LTD.
Defendant-Appellant.

No. 81-7303.

United States Court of Appeals,
Fifth Circuit.
Unit B

Aug. 27, 1981.

VANCE, Circuit Judge:

This case involves a challenge to the statutory scheme authorizing the United States Postal Service to prevent the obtaining of money through the mail by means of false representations. Appellant contends that the statutory provisions restrain advertising in a manner inconsistent with the protection afforded by the first amendment to commercial speech.

The congressional scheme is embodied in 39 U.S.C. § 3005 and 39 U.S.C. § 3007. Under section 3005[1] the Postal Service may in-

1. 39 U.S.C. § 3005(a) provides in pertinent part: Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false represention * * *, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

stitute administrative proceedings to determine whether money is being obtained through the mails by means of false representations. If a violation of section 3005 is established, that section permits the post-master to return to sender mail and money orders addressed to the violator. Section 3007[2] enables the Postal Service to obtain an injunction in district court to detain the mail of an alleged violator during the pendency of administrative proceedings under section 3005. The statute specifies that an injunction be granted upon a showing of probable cause to believe that section 3005 is being violated.

In February 1981, after instituting administrative proceedings under section 3005, the Postal Service filed the present suit against Athena Products, Ltd. under section 3007. Athena Products sells "health" products through the mails. It solicits orders for these products through advertisements in its own bi-monthly magazine, *Soma,* and through other publications. Each issue of *Soma* contains an order blank to be mailed to the address advertised in that issue along with payment for the desired products. This suit concerns alleged misrepresentations regarding fifteen advertised products.

At the hearing in district court in March 1981, both parties presented affidavits and testimony from expert witnesses as to the truth of the claims made in the advertising for the fifteen products. In its careful review of the evidence, the district court divided the fifteen products into three general categories: those

2. 39 U.S.C. § 3007(a) provides:

> In preparation for or during the pendency of proceedings under sections 3005 and 3006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postal Service and upon a showing of probable cause to believe either section is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

claimed to cause weight loss and figure modification[3], those advertised primarily as rejuvenating agents[4], and a third group of miscellaneous products.[5] The court concluded that the plaintiff had gone substantially beyond meeting its burden of showing that probable cause existed to believe that Athena's advertisements were "reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Outpost Development Corp.*, 369 F.Supp. 399, 402 (C.D.Calif.), *aff'd*, 414 U.S. 1105, 94 S.Ct. 832, 38 L.Ed.2d 733 (1973). Athena does

3. An example of the weight-loss group is Cellulite TR3:

> The unique TR3 formula features niacin, a natural and highly effective vasodilator, that causes every blood vessel and capillary to open up and flush itself out with fresh, cleansing blood. When used in the special time-release formula, niacin can even open the tiny capillaries in your cellulite-choked tissues so that your blood can remove accumulated wastes and also prevent their buildup. And, to assist in cleaning out the debris, Cellulite TR3 contains herbal diuretics that enable your body to quickly eliminate toxins while preventing the water retention that aggravates cellulite.

R. 143.

4. An example of the rejuvenating group is RNA:

> Don't let your body grow old before it's time. RNA helps slow the aging process before it stops you from enjoying life * * * The effects from RNA therapy seem almost miraculous. But when you consider that properly functioning RNA can essentially hold back the hands of time to keep you young and energetic, you can see why supplemental RNA can have such a tremendous impact.

R. 58.

5. The district court described this third group as follows:

> These products primarily provide vitamin and mineral supplements. Defendant expressly claims that these products will "help you improve your sexual performance and confidence" (Euzinc-D), "prevent the corrosive effects of oxidation from weakening your heart, muscles and other vital organs" (Ex-Sel), "improve your memory, thinking and concentration" and "measurably raise intelligence" (Food for Thought), "minimize the damaging effects of pollution on your looks and health" (Meta-E), cure "tension-caused sleeplessness and chronic insomnia" (Natural Calm), "prevent fatigue, facial pallor and brittle, dull fingernails" and prevent "water retention, hormone imbalance," and "dry, cracked lips" (Althena Nutrition for Women), prevent deficiencies that "lead to hypoglycemia, hyperglycemia and diabetes" (Chromill-GTF), and give you "a fast burst of energy" (Power Tabs).

not contend that we should overturn this determination.

In accordance with its findings, the district court issued an order directing the postmaster to detain all of Athena's incoming mail addressed to designated post office boxes and street addresses. The order also prohibited Athena from soliciting orders for the fifteen products to other post office boxes. The order provided that Athena could examine its mail and collect items unconnected with the alleged unlawful activities. Recognizing that Athena was "entitled to a speedy resolution of this matter by the USPS" the court limited the preliminary injunction to a period not to exceed 120 days.

On appeal, Athena pursues constitutional challenges rejected by the district court. Chief among these challenges is Athena's claim that the "chilling effect" of the statutory scheme upon its advertising infringes impermissibly upon its first amendment rights and those of the public. While no direct prohibition on speech is involved, Athena is obviously deterred from advertising products for which it cannot fill orders.

Athena relies heavily on the Supreme Court's opinion in *Blount v. Rizzi,* 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) which struck down a statutory scheme virtually identical to that in this case enabling the postmaster to proceed against persons believed to be selling obscene materials through the mails. The Court held that the statutes did not possess the characteristics required by the decision in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The scheme did not place the burden of initiating judicial review on the Postal Service; nor did it provide for prompt judicial review. Similarly, the statute authorizing detention of mail during the pendency of administrative proceedings upon a showing of probable cause failed to meet the requirement that "[a]ny restraint imposed in advance of a final judicial determination on the merits must...be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial discretion." *Blount v. Rizzi,* 400 U.S. at 421, 91 S.Ct. at 430 (quoting *Freedman v. Maryland,* 380 U.S. at 59, 85 S.Ct. at 739).

Subsequent to the decision in *Blount v. Rizzi,* however, the Supreme Court twice upheld the validity of the statutes at issue in this case. In *Lynch v. Blount,* 404 U.S. 1007, 92 S.Ct. 673, 30 L.Ed.2d 656 (1972), *aff'g* 330 F.Supp. 689 (S.D.N.Y.1971) the

Supreme Court affirmed the opinion of a three judge court holding that "the safeguards defined in *Blount v. Rizzi* [citation omitted] for obscenity cases are wholly inappropriate, unnecessary and inapplicable to the field of commercial fraud." 330 F.Supp. at 694. The principal distinction drawn by the lower court in reaching its judgment was that unlike obscenity, "[a] scheme to defraud by false representations can be objectively proved by evidence in an administrative hearing without going through the delay of a trial before a judge. Good old-fashioned schemes to defraud by the use of false representations are as old as the hills, and as easily recognized once the issues of credibility have been resolved." 330 F.Supp. at 695. The court also drew support from Supreme Court decisions upholding legislation authorizing the Postal Service to investigate commercial frauds and to issue stop orders. *Id.* at 692 (citing *Donaldson v. Read Magazine, Inc.* 333 U.S. 178, 68 S.Ct. 591, 92 L.Ed. 628 (1948); *Public Clearing House v. Coyne,* 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092 (1904)). *Lynch v. Blount* involved only section 3005. The following year, however, the Supreme Court upheld the constitutionality of section 3007 as well in *United States v. Outpost Development Corp.,* 441 U.S. 1105, 94 S.Ct. 832, 38 L.Ed.2d 733 (1973), *aff'g.* 369 F.Supp. 399 (C.D.Calif.1973). *Accord, United States Postal Service v. Beamish,* 466 F.2d 804 (3d Cir. 1972).

This considerable body of precedent is not dispositive of the present case, however, since it predates the Court's holding in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) that unwarranted governmental regulation of commercial speech infringes upon the first amendment rights of both speaker and listener. The present case thus poses the question whether *Lynch v. Blount* and *United States v. Outpost Development Corp.* survive *Virginia Board* and subsequent cases, or whether *Blount v. Rizzi* is now applicable even where only commercial speech is restrained.

In *Virginia Board* the Court made clear that it did not intend by its decision to impair the government's ability to regulate misleading or deceptive speech. "Obviously much commercial speech is not provably false, or even wholly false, but only deceptive and misleading. We forsee no obstacle to a State's dealing ef-

fectively with this problem." 425 U.S. at 771, 96 S.Ct. at 1830. The Court went on to note that "[t]here are commonsense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.* at 771 n.24, 96 S.Ct. at 1830 (citation omitted). The differences noted by the Court were primarily practical. The truth of commercial speech may be more easily verified by its disseminator than in the case of news reporting or political commentary. Moreover, the chilling effect of government regulation would be mitigated by the urgency of the profit motive. *Id.*

[1,2] In his concurring opinion, Justice Stewart drew more fundamental distinctions contrasting commercial speech with "ideological expression." Ideological expression "is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man." *Id.* at 779, 96 S.Ct. at 1834. The truth or falsity of any information contained in such speech is irrelevant in according first amendment protection. In contrast, commercial speech is valued only because of the information conveyed, "rather than because of any direct contribution to the interchange of ideas." *Id.* at 780, 96 S.Ct. at 1835. Thus government measures to insure accuracy are appropriate in the context of commercial speech although they would be repugnant elsewhere.

In the years since *Virginia Board* the Court has repeatedly emphasized that its decisions offer commercial speech only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Association,* 443 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). *Accord, Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 562-63, 100 S.Ct. 2343, 2349-2350, 65 L.Ed.2d 341 (1980); *Friedman v. Rogers,* 440 U.S. 1, 10, 99 S.Ct. 887, 894, 59 L.Ed.2d 100 (1979); *Bates v.*

State Bar of Arizona, 433 U.S. 350, 380–81, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810 (1977).[6]

[3] The care with which the Court has distinguished commercial from noncommercial speech indicates that its decisions upholding the constitutionality of sections 3005 and 3007 retain their vitality. The Court's clear concern to permit effective regulation of deceptive advertising and its suggestion that the prohibition against prior restraints may be inapplicable where commercial speech is concerned, *Virginia Board*, 425 U.S. at 771 n.24, 96 S.Ct. at 1830, negate any suggestion that prompt judicial review initiated by the censor is required whenever the government undertakes to regulate misleading advertising. This judgment reflects not only the "subordinate position in the scale of First Amendment values" allotted to commercial speech, *Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1918, but the comparative difficulties inherent in determining obscenity and misleading advertisement noted by the court in *Lynch v. Blount*. We conclude therefore that the decision in *Lynch v. Blount* upholding section 3005 remains good law. *Accord, Original Cosmetics Products, Inc. v. Strachan*, 459 F.Supp. 496 (S.D.N.Y.1978), *aff'd* 603 F.2d 214 (2d Ci), *cert. denied* 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 170 (1979).

[4–6] Of greater concern is the ability of the Postal Service under section 3007 to obtain an injunction detaining defendant's mail upon a showing of probable cause. The Court has indicated that the legislature is to be accorded considerable deference in regulation of misleading advertising even to the extent of permitting prior restraints. A section 3007 injunction therefore does not appear to trench upon first amendment values. Even though such an injunction may occasionally restrain accurate commercial speech for a period, the restraint is only temporary and the procedures provided insure against baseless government censorship. Counsel for Athena points out, however, that an injunction issued under section 3007 may last for the duration of administrative proceedings under section 3005, and that these proceedings may extend over a protracted period. While the govern-

6. For a concise analysis of the characteristics distinguishing commercial speech from speech protected under traditional first amendment theories see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va.L.Rev. 1 (1979).

ment may restrain commercial speech prior to a final determination on the merits in a manner that would be unconstitutional where noncommercial speech is concerned, the first amendment protects against erroneously imposed prior restraints of excessive duration even in the area of commercial speech. See *Space Age Products, Inc. v. Gilliaml,* 488 F.Supp. 775, 784 (D.Del.1980). Injunctions granted under section 3007 should therefore extend no longer than necessary for a prompt administrative determination on the merits conducted in the section 3005 proceeding. The district court met this requirement, noting that Athena was entitled to a speedy resolution in the administrative hearing, and carefully limiting the preliminary injunction to a period not to exceed 120 days.

Athena alleges that section 3007 reaches too broadly because it requires it to sort through all its mail and demonstrate which items are unrelated to the alleged deceptive advertising. Relying on *Central Hudson Gas,* 447 U.S. at 565-66, 100 S.Ct. at 2350-51, it asserts that the burden is on the government to demonstrate that its objective could not be more narrowly achieved. In *Central Hudson Gas,* the Court stated that whether a government regulation is more extensive than necessary only becomes a relevant question once it has been determined that the speech is not misleading. *Id.* at 563-64, 100 S.Ct. at 2350. The Court carefully avoided extending safeguards applicable to noncommercial speech to the regulation of misleading advertising. *Id,* at 566, 100 S.Ct. at 2351. But *see Beneficial Corp. v. FTC,* 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 LEd.2d 377 (1977) ("[A] remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception.").

[7] Athena argues almost in passing that the detention of its mail upon a showing of probable cause does not afford it due process of law.[7] In determining whether section 3007 provides

7. Precisely what constitutes a showing of probable cause under § 3007 is unclear. Our researches into the legislative history have not disclosed anything bearing on the question. As a practical matter, however, the district court appears to have operated in much the same way as if it were evaluating an attempt to show "probable success on the merits" in the usual preliminary injunction hearing. Other courts behave similarly. *See, e. g., United States Postal Service v. Oriental Nurseries,* 491 F.Supp. 1265 (S.D.Fla.1980).

adequate procedural protection, we must examine the competing interests asserted by the two parties and the risk of erroneous deprivation inherent in the procedures used. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The effect of an injunction of this kind upon a mail order house may be considerable. Athena is prevented from conducting business in the fifteen products at issue for its duration. These products constitute a substantial portion of the company's business. Because customer orders remain inexplicably unfilled, the injunction may result in consumer disaffection. On the other hand, the government asserts an important interest, identified by Congress, in protecting the public from the type of deception alleged in this case. Our inquiry thus focuses upon the risk of erroneous deprivation. In the course of the hearing before a federal judge, both parties presented considerable expert evidence. Several briefs were submitted. The detailed opinion of the district judge reflects the care with which argument and evidence were analyzed. Despite the fact the court assessed the evidence against a standard of probable cause, the hearing afforded in this case minimized the risk of an erroneous deprivation while accomplishing the important goal of preventing the perpetration of an allegedly fraudulent scheme prior to the final administrative decision on the merits. Accordingly, we conclude that the requirements of due process have been met. We do not wish, however, to understate the potential adverse effects of this kind of order for Athena or future defendants in similar cases. These defendants are entitled to prompt administrative resolutions of their cases. Accordingly, as we have already held on first amendment grounds, injunctions granted under section 3007 should not extend longer than necessary for a prompt administrative determination.[8]

8. Although it involves obvious differences, the Supreme Court's decision in *Barry v. Barchi,* 443 U.S. 55, S.Ct. 2642, 61 L.Ed.2d 365 (1979) is instructive in our due process analysis. In *Barchi,* a race horse trainer complained that he had been deprived of due process when his license was suspended without either a presuspension or a prompt postsuspension hearing. The Court held that "the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe [the existence of trainer misconduct]." 443 U.S. at 64, 99

[8] Finally, Athena contends that it was given an insufficient time to prepare its defense and was denied due process as a result. This contention is without merit. Compare the facts of the present case with *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*, 446 F.2d 353 (5th Cir. 1971).

The order issued by the district court in this case conforms to the requirements of the first amendment and due process. Accordingly, it is affirmed.

AFFIRMED.

S.Ct. at 2649. The Court made clear, however, that any "appreciable delay in going forward with a full hearing" following the suspension would violate due process. *Id.* at 66, 99 S.Ct. at 2650. The interest of the trainer was comparable to that of Athena. As described by the three judge court in the *Barchi* case, "[t]he private interest at stake is, simply, the right to a livelihood. Plaintiff has convincingly demonstrated that a trainer, once his license is suspended, rightly or wrongly, is potentially subject to a loss of clients and an irretrievable loss of income from any race meeting in progress." *Barchi v. Sarafan*, 436 F.Supp. 775, 781 (S.D.N.Y.1977). The interest of the Postal Service in the present case is at least as strong as that of the state's interest in *Barachi* in maintaining the integrity of racing. The procedural protection provided in the present case is significantly greater, than that afforded in *Barchi* since probable cause was determined after a full adversary hearing. In *Barchi* the trainer's license was suspended on the basis of an untested report by a single expert which the trainer was not given an opportunity to challenge.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES POSTAL SERVICE	]	
	]	
	]	CIVIL ACTION
	]	
vs.	]	
	]	
	]	NO. 81-358 A
	]	
ATHENA PRODUCTS, LTD.	]	

ORDER

Plaintiff in this action, the United States Postal Service (USPS), seeks a preliminary injunction directing the detention of defendant's incoming mail during the pendency of a statutory administrative proceeding. Defendant Athena Products, Ltd. sells a variety of products through the mail that are advertised by defendant as curing or preventing certain diseases and conditions and retarding the aging process. Through advertisements in nationally-circulated publications and its own bi-monthly magazine, *Soma,* as well by direct mail newsletters and advertisements, Athena solicits orders for its "health" products through the mail. Plaintiff alleges that defendant is conducting a scheme for obtaining money by means of false represenations in contravention of 39 U.S.C. § 3005.

The USPS has instituted administrative proceedings against Athena under 39 U.S.C. § 3005. Section 3005 provides, in part:

> (a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false

representations...the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

Plaintiff contends that the claims made in defendant's advertising regarding fifteen Athena products are false. The products that are the subject of the pending administrative proceeding are: (1) RNA, (2) RX for Aging, (3) Euzinc-D, (4) Cellulite P.M., (5) Cellulite TR3, (6) Ex-Sel, (7) Food for Thought, (8) Meta-E, (9) Natural Calm, (10) Athena Nutrition for Women, (11) Chromill-GTF, (12) Power Tabs, (13) Athena Stay Young Program, (14) Youth Factor, and (15) In-Trim or Control.

Plaintiff seeks relief from this court under 39 U.S.C. § 3007. Section 3007(a) provides:

In preparation for or during the pendency of proceedings under sections 3005 and 3006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postal Service and upon a showing of probable cause to believe either section is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained

mail be opened to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by the court hereunder does not affect or determine any fact at issue in the statutory proceedings.

Plaintiff asks that this court enter an order directing the detention of Athena's mail at eight enumerated post office boxes and one street address, and restraining defendant from soliciting money in regard to these products through any additional addresses until the conclusion of the administrative proceedings. The order would be subject to defendant's right to examine and have delivery of any mail not related to the alleged unlawful activity.

Defendant raises several defenses to plaintiff's application for an injunction. Defendant contends, first, that equitable considerations bar plaintiff's request for preliminary injunctive relief; the USPS should be barred by laches from bringing this suit. Second, defendant argues that a preliminary injunction under 39 U.S.C. §3007 would violate defendant's rights under the First Amendment of the United States Constitution. Third, defendant contends that in any event, plaintiff has failed to meet its burden under section 3007 on a "probable cause" or any other standard of showing the falsity of the claims made for Athena products.

The application of the USPS for an injunction detaining defendant's mail came before the court for a hearing on March 12, and 16, 1981, during which the parties presented extensive expert and other testimony in support of their contentions. For the reasons that follow, we will grant plaintiff limited injunctive relief under section 3007.

I. Equitable Defense

Defendant contends that plaintiff's application for injunctive relief should be barred because plaintiff has delayed unreasonably in bringing suit against Athena. The thrust of defendant's argument is that the USPS knew of the advertising and sale of the fifteen products that are the subject of this suit,

and purchased some of the products, in May or June of 1980. In addition, as other USPS administrative proceedings have been pending against defendant since July 1979, the USPS must have been aware of *Soma* magazine and Athena's products even earlier than the spring of 1980.

The defense of laches is "principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions." *Bleckley v. Bleckley,* 189 Ga. 47, 5 S.E.2d 206 (1939). Defendant has made no showing that the alleged six months to one year "delay" in bringing suit has prejudiced it in any way, or rendered the ascertainment of truth in this case difficult. *See, e.g., Johnson v. Sears,* 199 Ga. 432, 34 S.E.2d 541 (1945). The necessity of defending a suit is not the type of "prejudice" against which the defense of laches protects.

II. Constitutional Defense

Defendant's strongest argument against the imposition of the relief requested in this case is that section 3007 is unconstitutional as an infringement of defendant's First Amendment rights. The detention of Athena's mail will violate its constitutional rights, defendant argues, because the statute permits the undue restriction of protected speech without providing constitutionally-required safegards.

Title 39 of the United States Code protects against the use of the mails for soliciting money by means of false representations, or soliciting money for obscene materials. Section 3005, the section involved in this action, authorizes the USPS to take steps to deny the use of the mails to those who engage in false advertising or representations. Section 3006, formerly section 4006, establishes the same prohibitions for dealers in obscenity.

Defendant relies primarily on the analysis of *United States v. Book Bin,* 306 F. Supp. 1023 (N.D. Ga. 1969) which was affirmed by the Supreme Court in *Blount v. Rizzi,* 400 U.S. 410 (1971). In *Blount,* the Supreme Court affirmed the three-judge district court's holding in *Book Bin* that the statutory administrative scheme of censorship set up by 39 U.S.C. § 4007, which is now section 3007, and 39 U.S.C. §4006, now section 3006, was unconstitutional as it related to the detention and regulation of

obscene materials. The Court found that the statutory scheme violated the constitutional rights of the persons whose mail was detained because it lacked adequate safegards against the undue inhibition of protected expression. In particular, the Court found that the statutory scheme failed to meet the tripartite procedural requirements of *Freedman v. Maryland,* 380 U.S. 51 (1965), governing consorship: (1) the burden of initiating judicial reveiw must be on the censor, (2) prompt judicial review in the form of a final judicial determination on the merits must be provided and (3) restraints imposed to preserve the *status quo* in advance of a final judicial interpretation must be in limited to the shortest possible time. The Court found fatal defects in the Postal Service's scheme for controlling the use of the mails for selling or disseminating obscenity under all three elements of the *Freedman* test.

First, section 4006 did not require that the Postmaster General seek a prompt judicial determination of obscenity. Instead, after an administrative determination of obscenity the Postmaster General could stamp unlawful and return to the senders the orders for purchases of magazine or other materials. This could act as an unlawful restraint. Second, once obscenity was determined in the administrative proceedings, the burden shifted to the defendant to institute a judicial appeal and persuade the court that the materials are protected expression. The authority of the Postmaster General to apply to a district court under section 4007 for an order directing the detention of the defendant's incoming mail pending conclusion of the administrative proceedings did not cure the defects in the statute. Because the application for a detention order was discretionary with the Postmaster General, and the district court could grant the order merely upon a showing of "probable cause," the district court's intervention could not function as a substitute for "prompt judicial review on the issue of obscenity." *Blount v. Rizzi,* 400 U.S. at 420. Third, section 4007 failed to provide that any restraint imposed prior to a judicial determination to preserve the status quo would be limited to the shortest possible time.

Defendant argues that, because the Supreme Court held in 1976 that commercial speech is protected by the First Amendment, the rationale of *Blount* applies with as much force to the statutory regulatory scheme created by sections 3005 and 3007,

as it does to sections 3006 and 3007. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The statutes do not require the USPS to seek a prompt judicial determination of the falsity of the advertising claims. The scheme also permits the detention of purchase orders for products that were solicited by the allegedly false advertising on a showing of mere "probable cause", and places the burden on defendant of initiating judicial proceedings. The defendant's analogy of the instant case to *Blount* is, however, inapposite.

The Supreme Court's scrutiny of the USPS's regulatory scheme in *Blount* focused expressly on the constitutional right of the defendant, a retail magazine distributor, to sell and disseminate allegedly obscene matter, and implicity on the purchasers' or public's right to buy and receive those materials. Because sections 4006 and 4007 did not meet *Freedman* standards for a prompt full judicial determination of the issue of obscenity, the defendant's First Amendment right to free expression was inhibited. (In the instant case, however, the defendant's commercial expression is only tangentially implicated.) The First Amendment protects communication. The USPS seeks an order detaining only purchase orders for the purchase orders for the products for which defendant has allegedly made false claims. It does not seek to halt the making of the claims or to impound defendant's advertising. Plaintiff does not seek to enjoin defendant from publishing or distributing its magazine *Soma*, or from placing advertisements in other publications. Thus, a temporary detention of defendant's incoming mail would not prohibit defendant from disseminating commercial information or prohibit the public from receiving that information. *Cf. Beneficial Corp. v. FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (regulation of advertising by FTC cannot be overboard). The only result of the detention of defendant's mail would be a delay in the receipt and filling of orders for Athena products. Unlike the obscenity cases, the statutory scheme in this instance does not act to censor any form of expression.[1]

Even though a preliminary injunction would not suppress

[1]Defendant has not filed a cross-complaint seeking an injunction of the administrative proceedings or a declaration that the postal statutes are unconstitutional. We therefore address plaintiff's First Amendment

defendant's right to commercial speech, however, the statutory scheme at issue here may have a potential "chilling" effect on that expression. If Athena cannot respond to customers' purchase orders due to government interference with its mail, defendant alleges that, as a practical matter, its right to adveritse is inhibited. It is not good business to continue to solicit through advertisements orders that cannot be filled. Therefore, the mail detention "chills" defendant's protected right to commercial speech.

The Supreme Court has never indicated that the full panoply of constitutional safeguards that protect political and ideological speech and expression from prior restraint attach with equal force to commercial speech. We can find no authority for the proposition that the same prompt judicial determination on the merits that is required before expression can be prohibited as "obscene" is similarly mandated before commercial speech can be restrained as "false." The Court has, in fact, suggested the opposite. In *Virginia Board of Pharmacy,* which extended First Amendment protection to commercial speech, the Court stated:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," ...and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate informtion about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits,

arguments merely as defenses to plaintiff's claim for preliminary relief under section 3007.

there is little likelihood of its being chilled by proper regulation and forgone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker...They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive...

425 U.S. at 771 n. 24 (citations omitted). Because the advertiser ordinarily "seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else," there is little "danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression," and there is "little need to sanction 'some falsehood in order to protect speech that matters.' " *Id* at 771 n. 24; 777-78 (Stewart, J., concurring). Thus, the procedural safeguards that must be employed before expression can be restrained as obscene, are inappropriate when testing the "falsity" of commercial speech. *See Lynch v. Blount,* 330 F. Supp. 689, 694-95 (S.D.N.Y. 1971), *aff'd* 404 U.S. 1007 (1972). *See also Original Cosmetics Products, Inc. v. Strachan,* 459 F. Supp. 496, 498 (S.D.N.Y. 1978), *aff'd,* 603 F. 2d 214 (2d Cir.), *cert. denied,* 444 U.S. 915 (1979). The Court would appear, therefore, to allow the government broader power to suppress false advertising than to censor other forms of expression.

We believe that under the Postal Service's statutory scheme, there is little likelihood that accurate commercial speech will be chilled. Defendant's First Amendment rights will not be infringed by the imposition of a detention order on defendant's incoming mail.

III. Substantive Claims: Falsity of the Advertising

Having rejected defendant's initial defenses to these proceedings, we next turn to the questions of whether the USPS has made a showing that there is probable cause to believe that Athena is violating the provisions of 39 U.S.C. §3005. After ful-

ly reviewing the evidence, we believe such a showing has been made.

As a threshold matter, defendant argues that the standard of proof to be applied in this instance is not "probable cause," but the traditional and more stringent test for injunctive relief of "irreparable harm" and "likelihood of success on the merits." The statute provides that the district court shall enter an injunction detaining the defendant's mail pursuant to Rule 65, Fed. R. Civ. P., on a showing of "probable cause." The reference to Rule 65 in the statute, defendant argues, incorporates the standards for relief usually required under that rule.

In *United States Postal Service v. Beamish*, 466 F. 2d 804 (3d Cir. 1972), the Third Circuit held that the reference to Rule 65 in the statute merely delineates the procedural mechanics applicable to the hearing on probable cause. It does not incorporate the common law standards of the rule as well. The standard of "probable cause" expressly set out in the statute is to be applied. Even under this lenient test, however, "due respect must be accorded defendant's constitutional rights by requiring the Postal Service to meet clearly its burden under §3007 of demonstrating probable cause of a §3005 violation." *Id.* at 807.

We agree with the court in *Beamish* that the proper showing required of plaintiff in this case is that of "probable cause." Plaintiff must show that there is probable cause to believe that defendant's scheme "is reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Outpost Development Corp.*, 369 F. Sup. 399 (C.D. Cal.), *aff'd*, 414 U.S. 1105 (1973). Here, plaintiff has not only met but has gone substantially beyond that test.

The advertisements for the Athena products which are the basis of this lawsuit make various claims of the therapeutic effects of the products on the health of the consumers who use them. The products are different types of vitamin and mineral tablets which are ingested, and one topical cream to be applied to the skin. For the purpose of our review, the products can be loosely broken down into three groups.

In the first group are the products which defendant claims will cause weight loss and figure modification. Included in this group are Cellulite P.M., Cellulite TR3, and In-Trim (formerly Control). Use of Cellulite P.M., defendant advertises, will break up

"cellulite even while you sleep" by "speeding up the elimination of the wastes and toxins that combine with fatty tissues to form cellulite." Similarly, Cellulite TR3 can "dissolve those ugly lumpy fat deposits forever" by stimulating the circulatory system "to open up and flush out these hard-to-reach deposits." In-Trim provides "PPA" (phenylpropanolamine) which "has been shown to be just as effective as prescription appetite suppressants" and "is completely safe for dieters."

The second group includes RNA, RX for Aging, Youth Factor, and the Athena Stay Young Program. Among other purported beneficial effects, all of the products in this group are advertised primarily as rejuvenating agents and as supplements which will prolong youth. Some of the representative claims made by defendant for these products are that the ingestion of RNA tablets replaces "dead or decaying RNA" in the body, fades age spots, smooths wrinkles in the skin, and increases energy and sex drive. RX for Aging, a topical skin cream, will encourage "the renewed growth of firm, healthy skin tissue." Youth Factor, formulated with "anti-aging ingredients," provides superoxide dismutase which protects the body and skin from the aging process and also contains placenta, the "key factor" in "live cell therapy" which retards aging. The Athena Stay Young Program involves a regimin of four Athena products: RNA, Meta-E, Ex-Sel, and Chromill-GTF. This program is for "people who want to delay the onset of the effects of aging, as well as those who want to reduce existing age symptoms."

In the third and final group fall the remaining miscellaneous eight products: Euzinc-D, Ex-Sel, Food for Thought, Meta-E, Natural Clam, Athena Nutrition for Women, Chromill-GTF, and Power Tabs. These products primarily provide vitamin and mineral supplements. Defendant expressly claims that these products will "help you improve your sexual performance and confidence" (Euzinc-D), "prevent the corrosive effects of oxidation from weakening your heart, muscles and other vital organs" (Ex-Sel), "improve your memory, thinking and concentration" and "measurably raise intelligence" (Food for Thought), "minimize the damaging effects of pollution on your looks and health" (Meta-E), cure "tension-caused sleeplessness and chronic insomnia" (Natural Calm), "prevent fatigue, facial pallor and brittle, dull fingernails" and prevent "water reten-

tion, hormone imbalance," and "dry, cracked lips" (Athena Nutrition for Women), prevent deficiencies that "lead to hypoglycemia, hyperglycemia and diabetes" (Chromill-GTF), and give you "a fast burst of energy" (Power Tabs).

Both plaintiff and defendant presented affidavits and testimony from expert witnesses as to the truth or falsity of the claims made by Athena in its advertising for the fifteen enumerated products. The USPS relied primarily on the testimony of a doctor of pharmacology and a medical doctor with an expertise in nutrition. The doctor of pharmacology testified as to the established scientific methods of controlled clinical experimentation for testing the efficacy of drugs and other biological agents. Comparing the ingredients listed on the labels of the Athena products to the claims made in the advertising for the products, both of the doctors stated that there is no scientific evidence to support the therapeutic claims made by defendant.

Some of the claims are, in fact, "inane" according to the doctor's testimony. For example, the oral consumption of the yeast RNA in the product RNA, or the superoxide dismutatse and placenta in Youth Factor, will simply be digested as any other protein or foodstuff. The claim that ingestion of the product RNA will replace or alter cells and reverse the aging process is completely unsubstantiated. In addition, RX for Aging has no more curative properties than any moisturizer. The RNA contained in the cream cannot be absorbed through the skin.

Although the doctors testified that there is some theoretical evidence that the ingestion of certain vitamins and minerals, when deficient in the body, can alleviate certain conditions, deficiencies are rare in the population at large and the dosage contained in Athena's products would not be sufficient in any event to correct a deficiency. For example, zinc is a mineral that has been shown to be important in the health and functioning of the sexual organs. The doctors stated, however, that zinc has never been shown to be a sexual stimulant, as Athena asserts in its advertisement for Euzinc-D. Further, a zinc supplement could have a possible effect on impotency only if the person suffering from that malady was deficient in zinc, the deficiency was the cause of the impotency, and the dosage was adequate. Similarly, the claims made for Ex-Sel are also misleading. There is some

theoretical evidence that selenium, the primary ingredient in Ex-Sel, may act as an oxidant, but absolutely no evidence supporting the claims made by defendant that Ex-Sel tablets will prevent heart disease or sterility. In addition, too much selenium in the system may have toxic effects. Plaintiff's witnesses also testified that Athena Nutrition for Women contains vitamins B_2, B_6, B_{12}, folic acid, and iron. Deficiencies of these vitamins are rare causes of hormone imbalance or hair loss, and the dosage of iron in the product will have little effect on any iron deficiency.

With respect to L-glutamine, the advertised ingredient in Food for Thought, the doctors testified that there is simply no evidence to support any claim that it can stimulate the brain, prevent forgetfulness, or increase intelligence. As for Natural Calm, there have been some experiments with L-tryptophan and dolomite as sleep aids, but the dosages that have been shown to cause any effect whatsoever are much larger than those contained in defendant's product, and there is no substantiation for the claim that this product can cure insomnia. The chromium and manganese contained in Chromill-GTF may affect glucose tolerance, but will neither prevent nor affect the disease of diabetes, or help the user "recapture the vitality of his youth."

Vitamin E, the primary ingredient of the product Meta-E, is apparently currently a controversial vitamin. There is some theoretical evidence that vitamin E may act in the body to help scavenge for free radicals. There is absolutely no scientific evidence, however, to support the claims made in defendant's advertisements that Meta-E will, among other things, improve hormone production or protect the skin from environmental pollution. The doctors testified that RNA, Meta-E, Ex-Sel, and Chromill-GTF in combination, as in the Athena Stay Young Program, would have no different effect when taken together than when taken individually.

"Cellulite" is the popular term for subcutaneous fat that often forms in lumpy configurations, especially on women. Plaintiff's experts testified that cellulite can be removed only in the same manner as any body fat—through weight reduction and exercise. Cellulite TR3 or Cellulite P.M. will neither rid the body of subcutaneous fat deposits nor prevent their accumulation. There is some disputed evidence that "PPA", the active ingredient in In-Trim, may be a temporary appetite suppressant. Because

tolerance to the drug develops rapidly, its effects will not, however, "last throughout your diet." It is also not "safe for all dieters" as stated in the advertisement. The label on the product itself in fact states that persons with high blood pressure should not use In-Trim.

Finally, plaintiff's experts testified that the claims made for Power Tabs are also false and misleading. Energy derives from burning calories. Each "power tab" contains only one calorie of fructose. Deficiencies of the remaining ingredients—B-vitamins, magnesium, iron—may cause listlessness in some cases, but "Power Tabs" will not act as a quick energy booster.

Unfortunately, the nature of plaintiff's claims and the statute at issue here cast the district judge in the role of a medical expert who must evaluate scientific evidence and weigh the credibility of experts in the health field. However, the task for the court was alleviated to a great degree in this case by the lack of dispute between plaintiff's and defendant's expert witnesses on the critical scientific issues in this case.

First, defendant presented no controverting evidence at all as to some of the products, and very little as to other products. Defendant offered no evidence, scientific or otherwise, that Cellulite P.M. or Cellulite TR3 can, without accompanying exercise or diet, cause weight loss. Although the products contain an ingredient that increases blood circulation, there was no evidence that Cellulite P.M. or Cellulite TR3 inhibit the formation of cellulite or accelerate the burning of foods, as advertised by defendant. Although the doctors who testified for defendant had different opinions as to whether "cellulite" is simply fatty tissue, or whether it is composed of both adipose tissue and trapped waste materials, defendant's witnesses admitted that if the dilation agents in defendant's cellulite products were to have any effect in "flushing out hard-to-reach" fatty deposits under the skin, there must be a deficiency in the body to begin with. *See, e.g., Affidavit of William H. Saunders, M.D.* at ¶19.

As for the product In-Trim, containing the element "PPA" which has been touted as an appetite depressant, defendant presented no proof to refute plaintiff's evidence that "PPA" can have adverse effects on persons suffering from hypertension. In fact, defendant's instructions accompanying the product state that it should not be taken by persons with high blood pressure.

Thus, defendant's own instructions controvert the truth of defendant's claim that In-Trim is "safe for all dieters."

Similarly, defendant failed to produce any evidence to refute plaintiff's expert's opinions that yeast RNA taken orally in the Athena product RNA or exogenously in the cream RX for Aging, can replace or duplicate human body cells and therefore retard the aging process, fade age spots on the skin, eliminate wrinkles, or "alter" the "genetic make-up" of the body's cells. The gist of defendant's evidence, that RNA is a nucleic acid essential to the body's survival, was consistent with plaintiff's evidence. Defendant presented no evidence to support its anti-aging claims.

The remaining products caused greater controversy among the experts, but only on peripheral issues. The dispute centered on the possible and potential beneficial effects of vitamin and mineral supplementation on general health. The testimony revealed that defendant's support for its claims of the therapeutic effects of its products rests on either currently untested theories relating to certain vitamins or minerals, or on theories extrapolated from currently accepted knowledge as to the role of vitamins and minerals in human health. All the experts agreed, for example, that the minerals and vitamins contained in Food for Thought, Youth Factor, Athena Stay Young Program, Ex-Sel, Meta-E, Power Tabs, Euzinc-D, Athena Nutrition for Women, Chromill-GTF, and Natural Calm are important, and in some instances essential, to the proper functioning of the body. Adequate amounts of the principal elements contained in these products is important to optimal health. But not a single witness testifying for defendant by affidavit or at the hearing stated that in the absence of a deficiency would any of defendant's products have any effect on the user. Defendant's chief medical witness, Dr. Saunders, in fact admitted on the stand that even in cases of deficiency, defendant's products only have a potential of improving any of the particular symptoms that products are advertised to treat.

The issue most contested by the experts was whether there is a prevalence of vitamin and mineral deficiencies in the population at large. Plaintiff's witness asserted that due to the largely adequate diet and the ability of the body to store or to make on its own many essential elements, deficiencies are uncommon.

Defendant's witness testified, on the other hand, that deficiencies are ubiquitous in the general population, whether manifested in a clinical or discernable state, or merely in a subclinical or incipient state.

The prevalence or absence of vitamin and mineral deficiencies in our society, however, is not dispositive of the issue before this court of whether there is probable cause to believe that the advertising claims made by defendant for its products are false and misleading. Defendant's claims of the therapeutic effects of its products are phrased in unconditional and inflated terms, while the effects of the products are at best, and according to the testimony of defendant's own experts, dependent on whether there is a deficiency in the user and whether the deficiency is the source of the symptoms complained of. The fact that the products may have incidental beneficial or favorable effects in some instances including a possible placebo effect in some consumers, does not vitiate the falseness of the claims as stated in the advertising.[2] A glimmer of truth is not sufficient to refute the strong scientific evidence of falsity presented by plaintiff.

The court finds the defendant's advertising scheme is reasonably calculated to deceive persons of ordinary prudence and intelligence, and that there is probable cause to believe that the advertising for all fifteen Athena products named in the administrative complaints is deceptive and misleading. The injuctive relief sought by the USPS is therefore granted.

IV. Relief

Defendant argues vigorously against the scope of the relief requested by the USPS in this action. First, defendant argues that an order detaining Athena's mail will impose an undue hardship on Athena, resulting in a loss of business and customers, and possibly requiring a lay-off of employees. Second, Athena contends that it would be impossible to separate the mail that would be subject to the court's detention order from orders for other

[2]Defendant testified to the large numbers of repeat orders Athena receives for its products, offered into evidence several letters from satisfied customers, and stated that Athena Products, Ltd. has only received three complaints since it opened for business three to four years ago. In addition, Athena has an unconditional money-back guarantee on all its products.

Athena products. In addition, it would be difficult to discern which orders were directly solicited by defendant's advertising and which are re-orders of products. Third, because the USPS seeks to enjoin defendant from opening new postal boxes, the requested relief sweeps too broadly and would prohibit defendant from modifying its advertising for the products and seeking new orders at new addresses.

This court recognizes the temporary hardship and potential adverse effect on defendant's business that a mail detention order may cause. Nevertheless, in view of the showing made by plaintiff of the probable false and misleading nature of defendant's advertising, the issuance of a preliminary injunction is, we believe, proper in this case. There are a large number of consumers who may be affected by defendant's allegedly deceptive advertisements.

We are also aware, however, that an extended period of time between the commencement of the detention of defendant's mail and a final ruling on the administrative complaints in this case may work a disproportionate hardship on defendant. Considering that the government does not contend that defendant's products, except in a few rare instances, are on the whole harmful to the public, we believe the defendant is entitled to a speedy resolution of this matter by the USPS. The court will therefore limit the preliminary injunction detaining defendant's mail to a period not to exceed 120 days.

Athena's argument that it is impossible to separate the various orders for different products from each other, or to separate new orders from re-orders is neither indicative of the overbreadth of the proposed injunction, nor is it supported by the evidence. Defendant's vice president in charge of marketing testified that Athena frequently uses color and other types of coding on envelopes and order forms to differentiate between orders for different products and between initial and re-orders. Athena also has directed certain mail solicitations to specific post office box address as a marketing research device. Defendant will be permitted to examine its mail to separate out items not connected with this action. To the extent that there is unavoidable overlap, however, in that a customer may write one check for several products not all of which are the subject of this action, defendant must simply bear the loss. The potential for overlapping orders

will not defeat the injunction in this case. In addition, we are not convinced that a re-order for one of the fifteen enumerated products is substantively different from an initial order for the product solicited through defendant's advertising. Plaintiff may detain all the mail relating to orders for the fifteen enumerated Athena products.

We also reject defendant's argument that an injunction appropriately tempered to maintain the status quo between defendant and the public until completion of the administrative proceedings must exclude from its reach postal addresses that defendant may choose to open in the future. The statute is designed to protect the unwary pending an administrative determination of the merits of plainfiff's complaint. Permitting defendant to open new post office boxes or other addresses would defeat that purpose.

In sum, plainiff may have the injunctive relief it requests, limited only by the temporal restrictions stated above. Counsel for plaintiff shall prepare an appropriate order for the court's approval.

Accordingly, plaintiff's application for a preliminary injunction is GRANTED. Plaintiff shall immediately prepare an appropriate order pursuant to the terms of this order.

IT IS SO ORDERED, this 27th day of March, 1981.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 81-7303

UNITED STATES POSTAL SERVICE

Plaintiff-Appellee,

versus

ATHENA PRODUCTS, LTD.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion August 27, 1981, 5 Cir., 198 , _____F.2d_____).

(OCT 1981)

Before HILL and VANCE, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Adminstrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Adminstrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*District Judge of the Northern District of Alabama, sitting by designation.

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR STAY OF THE
MANDATE

APPENDIX D

§ 3005. False representations; lotteries

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under such section 3001(d) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c)As used in this section and section 3006 of this title, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 747; Pub.L. 93-583, § 4, Jan. 2, 1975, 88 Stat. 1916; Pub.L. 94-525, § 2, Oct. 17, 1976, 90 Stat. 2478; Pub.L. 95-360, Sept. 9, 1978, 92 Stat. 594.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1254

In the Supreme Court of the United States

OCTOBER TERM, 1981

ATHENA PRODUCTS, LTD., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1254

ATHENA PRODUCTS, LTD., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the constitutionality of 39 U.S.C. (& Supp. III) 3005 and 3007, which permit the United States Postal Service to prevent the use of the mail for obtaining money or property by means of false and misleading representations. Under 39 U.S.C. (& Supp. III) 3005, the Postal Service may, after an administrative proceeding, return to the sender, "appropriately marked as in violation of this section," mail and money addressed to "any person * * * engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations * * *." The orders issued by the Postal Service under Section 3005 permit the delivery of mail unrelated to the fraudulent scheme. Under 39 U.S.C. 3007, the Postal Service may sue in a United States district court and, upon a showing of probable cause, obtain a preliminary injunction detaining the mail of a person alleged to be engaged in a fraudulent scheme, pending the conclusion of

the administrative proceeding under Section 3005. Section 3007 specifies that a district court "may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity."

1. Petitioner advertises and sells through the mail a number of products that, it claims, will do such things as "cause weight loss and figure modification," "prolong youth" by acting as "rejuvenating agents," " 'help * * * improve * * * sexual performance and confidence,' * * * 'improve your memory, thinking, and concentration' and 'measurably raise intelligence' " (Pet. App. B-1, B-9 to B-10). The publication in which petitioner advertises these products contains an order blank that is to be mailed, with payment, to petitioner's address (*id.* at A-2).

In February 1981, the Postal Service initiated a Section 3005 administrative proceeding against petitioner, citing its representations concerning 15 of its products. The Postal Service also filed suit in the United States District Court for the Northern District of Georgia, seeking a preliminary injunction under Section 3007 (Pet. App. A-2).

In the district court, the Postal Service presented testimony from a doctor of pharmacology and a medical doctor, both of whom "stated that there is no scientific evidence to support the therapeutic claims made by" petitioner (Pet. App. B-11). The Postal Service also presented supporting affidavits (*ibid.*). Petitioner "presented no controverting evidence at all as to some of the products, and very little as to other products" (*id.* at B-13). The district court concluded that petitioner's advertising was "reasonably calculated to deceive persons of ordinary prudence and intelligence" and that there was "probable cause to believe that the advertising for all fifteen * * * products named in the administrative complaints is deceptive and misleading" (*id.* at B-15).

The district court accordingly entered an injunction permitting the Postal Service to detain "all the mail relating to orders for the fifteen enumerated * * * products" (Pet. App. B-17). The court expressly gave petitioner the right to review the mail and collect "any mail not related to the alleged unlawful activity"; it rejected, as unsupported by the evidence, petitioner's claim that it was impossible to separate mail connected to the 15 items from other mail (*id.* at B-3, B-16 to B-17). The district court did rule, however, that petitioner "is entitled to a speedy resolution" of the administrative proceeding, and it accordingly limited the preliminary injunction to 120 days (*id.* at B-16). The court of appeals affirmed, rejecting petitioner's constitutional claims (*id.* at A-1 to A-10).[1]

2. The constitutionality of Sections 3005 and 3007 is well established. In *Donaldson* v. *Read Magazine*, 333 U.S. 178, 189-191 (1948), and *Public Clearing House* v. *Coyne*, 194 U.S. 497, 505-516 (1904), the Court upheld this statutory scheme against a constitutional challenge. *Blount* v. *Rizzi*, 400 U.S. 410 (1971), invalidated both 39 U.S.C. 3006, a statute similar to Section 3005 but directed to obscene publications instead of fraudulent schemes, and the use of Section 3007 in connection with proceedings under 39 U.S.C. 3006. But *Blount* v. *Rizzi* carefully distinguished Section 3005. See 400 U.S. at 414-415 n.2. Subsequent to *Blount* v. *Rizzi*, the Court summarily rejected constitutional challenges to Sections 3005 and 3007. *Lynch* v. *Blount*, 404 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.

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[1]The court of appeals stated (Pet. App. A-8):

> Injunctions granted under section 3007 should * * * extend no longer than necessary for a prompt administrative determination on the merits conducted in the section 3005 proceeding. The district court met this requirement, * * * carefully limiting the preliminary injunction to a period not to exceed 120 days.

N.Y. 1971) (Section 3005); *Outpost Development Corp.* v. *United States*, 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (Section 3007).

Petitioner asserts (*e.g.*, Pet. 16) that the Court should reconsider these decisions because, after they were issued, the Court extended constitutional protection to some forms of commercial speech.[2] But, as the court of appeals recognized (Pet. App. A-5 to A-7), this Court has made it clear that deceptive commercial speech is not entitled to constitutional protection. See, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 9-10 (1979); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 464-465 (1978); *Bates* v. *State Bar*, 433 U.S. 350, 383 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 (1976).

The district court found that the 15 advertisements at issue are deceptive; petitioner did not contest that finding in the court of appeals (Pet. App. A-3 to A-4) and does not appear to contest it now.[3] Indeed, it is questionable whether petitioner's promotional scheme should even be classified

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[2]In *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D. N.Y. 1978), aff'd, 603 F. 2d 214 (2d Cir.), cert. denied, 444 U.S. 915 (1979), this Court declined to review a constitutional challenge to Section 3005 even though it had previously held that the First Amendment protects commercial speech.

[3]Petitioner does appear to suggest (*e.g.*, Pet. 17-19) that Sections 3005 and 3007 are constitutionally infirm because they may reach expression that is merely misleading and not an outright falsehood. But the Court has never held that commercial speech must be demonstrably false in order to be regulated; it is enough that the speech is "more likely to deceive the public than to inform it" (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563) or that "there is a significant possibility that" the regulated speech "will * * * mislead the public" (*Friedman* v. *Rogers*, *supra*, 440 U.S. at 13). See also *Ohralik* v. *Ohio State Bar Association*, *supra*.

as speech; by its terms Section 3005 applies to "scheme[s] or device[s] for obtaining money or property through the mail by means of false representations," and "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language" (*Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); see *Ohralik* v. *Ohio State Bar Association, supra*, 436 U.S. at 456).

In any event, since this Court's commercial speech decisions foreclose the argument that petitioner's deceptive promotions for the 15 items were constitutionally protected, petitioner's challenge to Sections 3005 and 3007 must rest on its assertion (*e.g.*, Pet. 9-11, 17) that those statutes will have an effect on some other party's protected commercial speech—that is, that they are overbroad. But not only are Sections 3005 and 3007 designed to sanction only deceptive speech; in addition, "the overbreadth doctrine does not apply to commercial speech" (*Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982), slip op. 7; see *Central Hudson Gas & Electric Corp.* v. *Public Service Commission, supra*, 447 U.S. at 565 n.8). "Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." *Bates* v. *State Bar, supra*, 433 U.S. at 383; see *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra*, 425 U.S. at 771-772 n.24, citing *Donaldson* v. *Read Magazine, supra*. For these reasons, this Court's decisions extending constitutional protection to commercial speech furnish no reason to reconsider the constitutionality of Sections 3005 and 3007.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1982

DOJ-1982-03